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OCT 22 1990

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In re Application of )  
VALLEY PUBLIC TELEVISION, INC. ) File No. BPET-900904KF  
For a Construction Permit for )  
a New Noncommercial Educational )  
Television Station on )  
Channel \*39, Bakersfield, CA )

To: Chief, Mass Media Bureau

PETITION TO DENY,  
OR IN THE ALTERNATIVE, TO DISMISS

Theodore D. Frank  
Paul J. Feldman

ARENT, FOX, KINTNER, PLOTKIN  
& KAHN  
1050 Connecticut Ave., N.W.  
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Of Counsel:

Glenn C. Schroeder, Esquire  
Community Television of  
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4401 Sunset Boulevard  
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Date: October 22, 1990

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Before the

Rather than advancing assertions applicable to its situation, VPT's waiver request relies on the grant of CTSC's waiver. However, there are substantive differences between the two applications. For both these reasons, the application should not have been accepted for filing and must be dismissed. In addition, VPT violated the Commission's ex parte rules when it solicited Congressional support for the grant of an earlier

Hammett & Edison, VPT's proposed antenna site is only 85.4 kilometers from the reference point for Channel \*25 in Ridgecrest, and thus is over ten kilometers short spaced. Further, VPT did not submit any request for a waiver of Section 73.610. Consequently, its application is patently defective and should not have been accepted for filing. See Family Television, Inc., 85 F.C.C.2d 986, 987 (1981). Accordingly, under Sections 73.3564 and 73.3566 of the Commission's rules, the application must be dismissed.

**II. VPT's Request for Waiver of the ATV Freeze Was Incomplete and Does Not Support Grant of a Waiver**

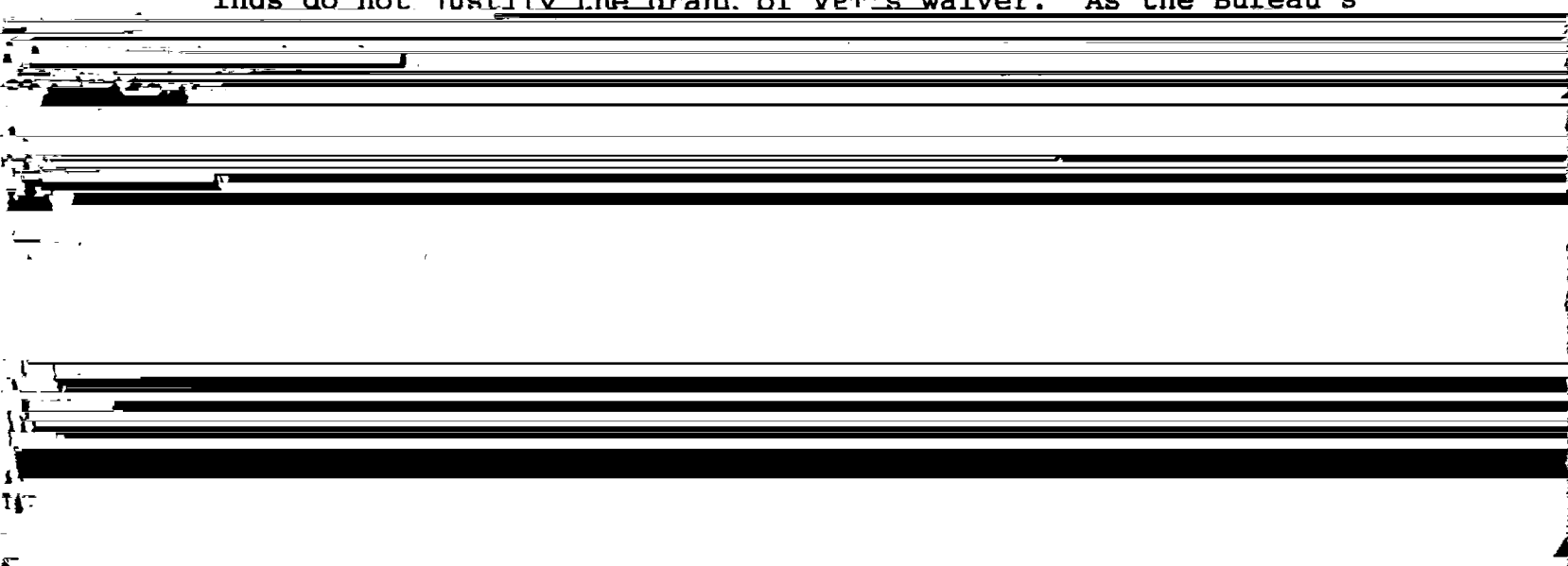
In its July 16, 1987 Order in the Advanced Television Systems proceeding, the Commission imposed a freeze on applications for construction permits for all television stations in markets located within the minimum co-channel separation distance from thirty television markets, including Los Angeles. Order in MM Docket No. 87-268, RM 5811 (Mimeo No. 4074) (hereinafter referred to as the "ATV Freeze"). In that decision, the Commission indicated, however, that it would consider on a "case-by-case basis" whether to waive the ATV Freeze for non-commercial applicants or others who provide compelling reasons why the freeze should not apply to their "particular situation." Id. at ¶2.

In its application, VPT states that, since it was filing its application in response to the cut-off notice for CTSC's application, it does not believe a request for a waiver

of the ATV Freeze is needed. (See Exhibit 2 to VPT's Application). It goes on to state, however, that "if the Commission believes that a request for a waiver is necessary, then Valley Public Television hereby requests such a waiver, pursuant to the findings set forth" in the letter granting CTSC's waiver request. This showing is insufficient to support the grant of VPT's waiver request.

It is well established that an applicant requesting a waiver of the Commission's rules has the burden of proof and persuasion that grant of the waiver will serve the public interest. W.A.I.T. Radio v. FCC, 459 F.2d 1203, 1207 (D.C. Cir. 1972). And, as noted above, the Commission stated in its Order adopting the ATV Freeze that waivers of the freeze would be made on a "case-by-case" basis where the applicant demonstrated that the freeze should not apply to the applicant's particular situation.

VPT has not met this burden. Indeed, the sole basis on which it seeks a waiver of the rule is the findings supporting the grant of CTSC's waiver request.<sup>2</sup> However, those findings do not justify the grant of VPT's waiver. As the Bureau's



that, based on CTSC's proposed transmitter site, the operation of CTSC's proposed station would not preclude the use of Channel 39 for ATV Los Angeles. That showing rested on a detailed engineering analysis of how the signal from CTSC's proposal would be blocked by the terrain between Bakersfield and Los Angeles, as well as a showing regarding the signal strength in the Los Angeles basin of Station KNSD(TV), Channel 39, San Diego. Since VPT's application proposes a transmitter site that is about 8.3 miles away from CTSC's proposed site and will operate with a center of radiation that is 1190 meters higher than CTSC's center of radiation, the showing supporting CTSC's waiver request can not be relied upon to support VPT's waiver request.

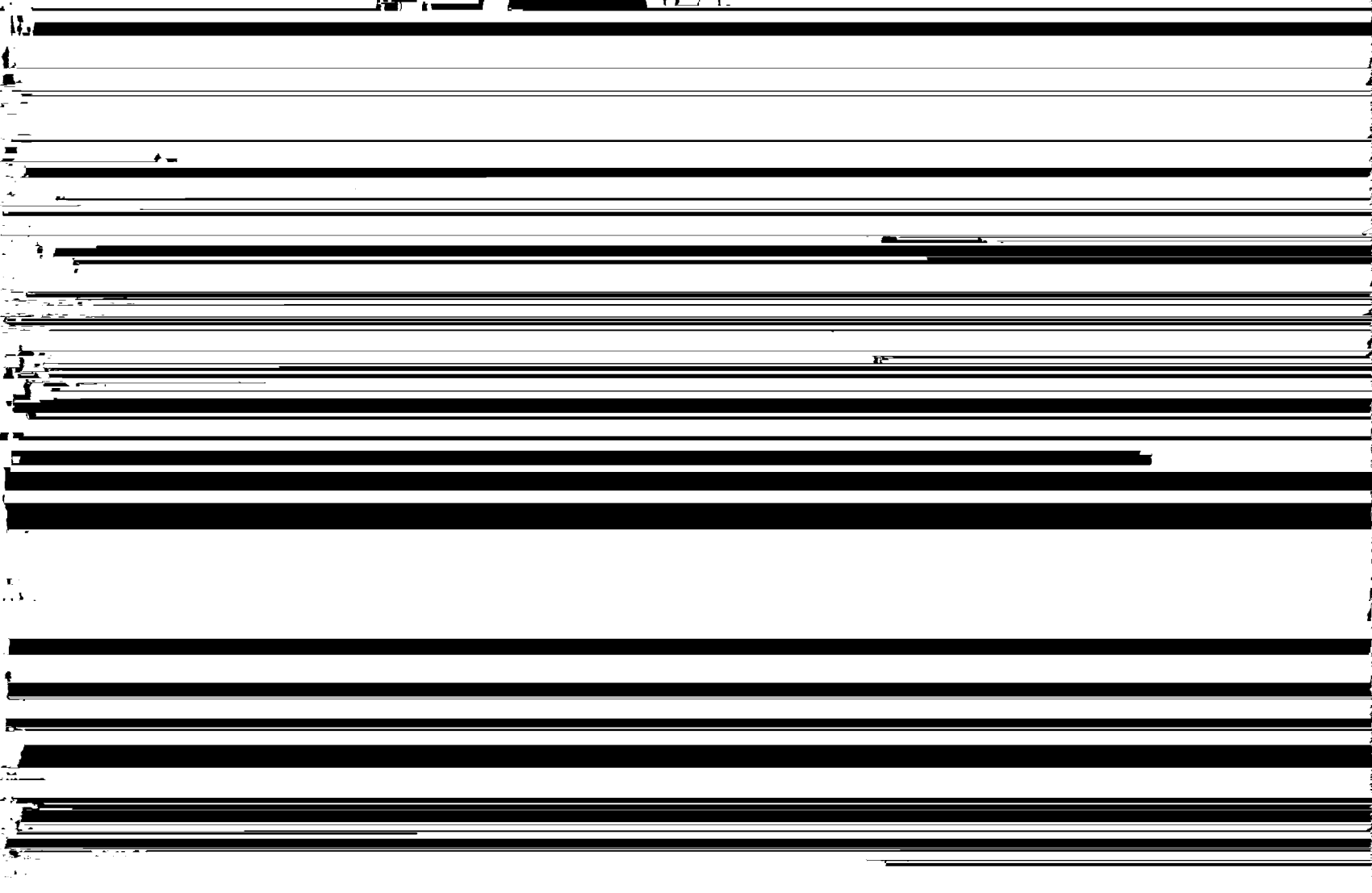
As the Commission has held in the analogous situation where it allows applicants to rely on terrain showings to resolve questions of interference, terrain showing must be based on the particular facts of each application. LPTV Terrain Shielding Policy Statement, 3 F.C.C. Rcd 2664, 2666 (1988), on recon. 3 F.C.C. Rcd 7105 (1988). Thus, the Commission stated: "applicants seeking waivers based on terrain shielding . . . make the required showing in each case and cannot incorporate by reference any earlier waiver." Id. The Commission went on to hold that "[i]n order to be considered, waiver requests must be supported by a demonstration that the

because of the intervening terrain." Id. at 2665 (emphasis added).<sup>3</sup>

The same policy considerations underlying that requirement apply equally here, and obligate VPT to make a complete showing in support of its waiver request. Since VPT has failed to make that showing, its application was not "substantially complete" when filed and, under Section 73.3564 of the Commission's rules, should be dismissed.

**III. VPT's Violation of the Commission's Ex Parte Rules in a Related Proceeding Preclude Grant of its Application**

As indicated in Exhibit 2 to its application, VPM has





nel 65 relating to this issue.<sup>4</sup> A copy of that section of the Petition to Deny is attached as Appendix A.

VPT filed a response to that Petition, in which it argued that (a) it did not violate the ex parte rules because it did not request ex parte communications, and (2) if it violated those rules, so did CTSC when CTSC solicited congressional letters urging Commission action on CTSC's request for a waiver of the ATV freeze. (See Opposition of VPT to Petition to Deny, filed Oct. 1, 1990). Those claims are meritless.

First, while it may be true that VPT's General Manager, Mr. Dougherty, did not request members of Congress to send ex parte communications to the Commission, VPT cannot escape responsibility for acts it initiated. It is clear from the Commission's decisions adopting the ex parte rules that communications from members of Congress that go to the merits of contested proceedings are to be discouraged and, in all events, must be served on the opposing parties. Ex Parte Communications and Presentations, 3 F.C.C.Rcd. 3995 (1988). The letters from Congressmen Condit, Lehman, and Pashayan and the letter from Senator Wilson were, by VPT's own admission, requested by Mr. Dougherty. VPT does not deny that they were not served on CTSC. As such, they violated the ex parte rules. VPT cannot lay the blame for that violation on someone else. Indeed, any

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<sup>4</sup> See Petition to Deny the Application of Valley Public Television, Inc. for a new television translator station on Channel 65, Bakersfield, California, BPTT-8912084, filed Sept. 14, 1990.

interpretation of Section 1.1210 of the Commission's rules which would excuse requests for congressional assistance going to the merits of restricted proceedings as long as the party did not ask that the member make an ex parte contact would effectively render the rule meaningless.<sup>5</sup>

Second, VPT's claim that CTSC also violated the ex parte rules is not supported by the record. VPT's argument rests on letters which Congressmen Dreier and Thomas sent to the Commission. See Appendix B. However, those letters demonstrate on their face that no violation of the ex parte rules is stated. They both urge Commission action on CTSC's request for a waiver of the ATV Freeze, an action which would have had no adverse affect on VPT or its application. Moreover, even assuming arguendo that those communications went to the merits of a disputed matter, counsel for CTSC served copies of the letters on counsel for VPT promptly and VPT was made aware of the communications in a timely manner. In contrast, CTSC learned of the communications on behalf of VPT when it received formal notification from the Commission's Managing Director. Since the congressional correspondence did not go to the merits of a disputed matter and since CTSC took effective steps to

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<sup>5</sup> Even assuming arguendo that VPT's interpretation of Section 1.1210 is correct, the material it submitted in its Opposition to CTSC's Petition to Deny only shows that the requests for assistance made to Congressman Pashayan specifically asked that CTSC be served. There is no such evidence, save perhaps Mr. Dougherty's self serving and conclusory affidavit, that the requests to the other members of Congress were accompanied by a similar request.

assure that VPT was served with any communications sent to the Commission, no violation of the ex parte rules occurred.

**Conclusion**

For the reasons set forth above, CTSC urges the Commission to deny or dismiss VPT's application as unacceptable for filing. In addition, VPT's violation of the ex parte rules also require that the application be denied or, in the alternative, designated for hearing to determine whether VPT possesses the requisite character qualifications to hold a Commission license.

Respectfully submitted,

  
Theodore D. Frank

  
Paul J. Feldman

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Of Counsel:

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4401 Sunset Boulevard  
Los Angeles, California 90027

Date: October 22, 1990

# COMMUNITY TELEVISION OF SOUTHERN CALIFORNIA

## STATEMENT OF DANE E. ERICKSEN, CONSULTING ENGINEER

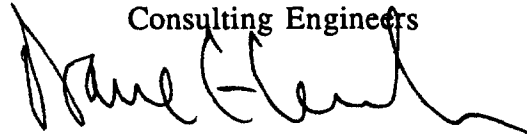
The firm of Hammett & Edison, Inc., Consulting Engineers, has been retained by Community Television of Southern California, licensee of TV Station KCET, Los Angeles, California, to study the pending application of Valley Public Television, Inc. ("VPT") for construction permit for a new non-commercial educational broadcast station on Channel 39 in Bakersfield, California, FCC File No. BPET-900904KF.

My review of the technical portion of the application, dated August 22, 1990, shows that no consideration was given to the allocation conditions. Specifically, the VPT application did not indicate that it would violate the minimum distance separation required in Section 73.610; no waiver of that section of the Rules was requested. The current table of channel allotments in the Rules shows that Channel 25 has been allotted to Ridgecrest, California. The geographical coordinates of that community, as set forth in the Index to the National Atlas of the United States of America, are North Latitude 35° 37' 30", West Longitude 117° 40' 12". The coordinates specified in the VPT application for Channel 39 in Bakersfield are N 35° 27' 14", W 118° 35' 37". This proposed transmitter site is located a distance of 85.9 kilometers from the Channel 25 allotment to Ridgecrest. This would result in a violation of the required 95.7 kilometers specified in Section 73.698 of the Rules for stations operating 14 channels apart. The Breckenridge Mountain transmitter site specified by VPT is therefore unusable for Channel 39.

## CONCLUSION

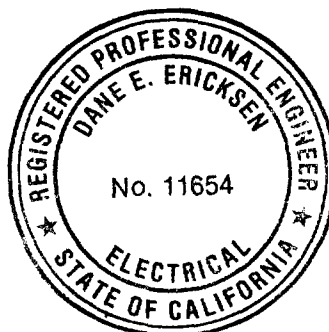
As a result of the studies made, it is my opinion that the application of Valley Public Television Inc. for Channel 39 in Bakersfield specifies a transmitter site which would result in a violation of the minimum spacing requirements of the Rules.

HAMMETT & EDISON, INC.  
Consulting Engineers



Dane E. Ericksen, P.E.

October 18, 1990



**AFFIDAVIT**

State of California     )  
                                  ) ss:  
County of San Mateo    )

Dane E. Ericksen, being first duly sworn upon oath, deposes and says:

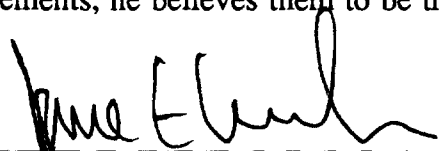
1. That he is a qualified Registered Professional Engineer, holds California Registration No. E-11654 which expires on September 30, 1992, and is employed by the firm of Hammett & Edison, Inc., Consulting Engineers, with offices located near the city of San Francisco, California,

2. That he graduated from California State University, Chico, in 1970, with a Bachelor of Science Degree in Electrical Engineering, was an employee of the Field Operations Bureau of the Federal Communications Commission from 1970 to 1982, with specialization in the areas of FM and television broadcast stations and cable television systems, and has been associated with the firm of Hammett & Edison, Inc., since October 1982,

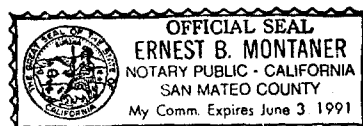
3. That the firm of Hammett & Edison, Inc., Consulting Engineers, has been retained by Community Television of Southern California, licensee of TV Station KCET, Los Angeles, California, to study the pending application of Valley Public Television, Inc. ("VPT") for construction permit for a new non-commercial educational broadcast station on Channel 39 in Bakersfield, California, FCC File No. BPET-900904KF,

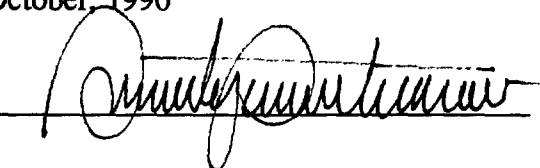
4. That such engineering work has been carried out by him or under his direction and that the results thereof are attached hereto and form a part of this affidavit, and

5. That the foregoing statement and the report regarding the aforementioned engineering work are true and correct of his own knowledge except such statements made therein on information and belief, and as to such statements, he believes them to be true.

  
Dane E. Ericksen, P.E.

Subscribed and sworn to before me this 18th day of October, 1990





## **APPENDIX A**

III. KMTF's Violation of the Ex Parte Rules in Another Related Proceeding Precludes Grant of this Application.

This application is one of a series that KMTF has filed for facilities in Bakersfield.<sup>7</sup> In connection with one of those applications, KMTF violated the Commission's ex parte rules by soliciting and obtaining letters from members of Congress urging the grant of its contested application which were not served on CTSC.

Specifically, on June 24, 1988, KMTF filed an application for a television translator station on Channel 36 in Bakersfield. (See File No. BPTTL-JC0624QF). CTSC filed a petition to deny that application raising a number of questions as to whether the application complied with the Commission's

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<sup>7</sup> KMTF has filed applications for a full power television station on Channel \*39 in Bakersfield (File No. BPET-881230KG) and two applications for Channel 36 (File No. BPTT-JK0624QF and File No. BPTT-JA0702MF). KMTF's initial

processing requirements for LPTV stations, whether KMTF had completed the application honestly and accurately, and whether the application could be granted under the land mobile freeze.<sup>8</sup> After CTSC's Petition was filed, KMTF undertook a campaign to put congressional pressure on the Commission to grant its application and to dismiss CTSC's Petition. A number of those letters were not served on CTSC or its counsel, and CTSC learned of their submission only because the Commission's Executive Director sent copies to its counsel.

Attached hereto as Exhibit 2 are letters written on behalf of KMTF by Representatives Gary A. Condit, Richard H. Lehman, and Charles Pashayan<sup>9</sup> and by Senator Pete Wilson.

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8 In that Petition, CTSC noted that KMTF had responded "no" to Question 5 of Section III. That question asks whether the applicant has ever had an application dismissed with prejudice by the Commission. However, KMTF had filed an application for Channel 36 in 1987 which had lost a lottery. While KMTF's 1987 application had not technically been dismissed when it filed the 1988 application, KMTF was aware of the lottery results and should have at least disclosed its earlier filing. CTSC noted that such disclosure was particularly appropriate since the 1988 application was only acceptable for filing if the 1987 application had been dismissed. See Petition to Deny in File No. BPTT-JC0624QF filed by Community Television of Southern California on August 31, 1989, at pp. 5-6.

In this application, KMTF has again failed to reveal the dismissal of its 1987 application. The failure to reveal this information can not be considered a mere oversight on KMTF's part. CTSC specifically alerted KMTF of the importance of fully responding to Question 5 in CTSC's petition to deny its 1988 Channel 36 application and thus one would think KMTF would have been sensitized to the need to answer the question accurately.

9 Congressman Pashayan wrote to the Commission twice, once on November 6, 1989, and once on November 22, 1989.



Enclosed with Senator Wilson's letter was a letter from Mr. Colin Dougherty, General Manager of KMTF, specifically requesting the Senator's assistance in securing approval of the application. KMTF's action in soliciting these letters is a clear violation of the Commission's ex parte rules and precludes the grant of its application.

The Commission has consistently held that its ex parte rules are designed to ensure that its "decisional processes are fair, impartial, and otherwise comport with the concept of due process." Section 1.1200(a). Those rules are intended

to deter improper communications and maintain the utmost public confidence in Commission proceedings, specify standards of conduct and procedures to be followed with regard to ex parte presentations in Commission proceedings and provide for the imposition of sanctions for violation of these standards and procedures.

Id. As the Commission noted when it adopted the ex parte rules,

the right of every person to a decision based on the merits of his case is rooted as deeply as a concept in the foundation of our judicial system . . . . To protect this right, our system provides for decision on the basis of a record, compiled openly in accordance with evidentiary and procedural safeguards.

Rules Governing Ex Parte Communications, 1 F.C.C.2d 49, 50 (1965). See also WKAT, Inc. v. FCC, 286 F.2d 375, 383 (D.C. Cir. 1961).

Except for specific exemptions not relevant here, the ex parte rules prohibit any communication directed to the

merits or outcome of a restricted proceeding<sup>10</sup> that is made to decision-making personnel and that is not served on the parties to the proceeding.<sup>11</sup> Even inquiries relating solely to the status of a proceeding are prohibited where they state or imply a preference for a particular party or position, state why timing is important to a particular party, or in any other way are intended to address, directly or indirectly, the merits or outcome or to influence the timing of a proceeding. See Section 1.1202(c), Note.

Further, while the Commission has recognized that members of Congress have a legitimate role in supervising the Commission's activities and in assuring that their constituents are not subjected to inordinate delay, it has also consistently held that congressional intervention that goes to the merits or the outcome of adjudicatory proceedings is impermissible.<sup>12</sup>

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10 There is no question but that KMTF's Channel 36 application became a restricted proceeding after CTSC had filed its Petition to Deny. See Section 1.1208. That is true even if, for some reason, CTSC's Petition is considered as an Informal Complaint, rather than a petition to deny. Ex Parte Communications and Presentation, 2 FCC Rcd. 3011, 301 (1987) (¶ 27), 47 C.F.R. § 1.1203(e).

11 Those rules prohibit both written and oral communications with decision-making personnel going to the merits of the proceeding. Oral communications are prohibited when made without advance notice to the parties to the proceeding and without an opportunity for them to be present. Section 1.1202(b)(2).

12 See, e.g., New Continental Broadcasting Co., 87 F.C.C.2d 517 (1981); Fine Music, Inc., 8 F.C.C.2d 529, 520 (1967).

Thus, in its recent revision of its ex parte rules the Commission stated:

Any congressional or other communication expressing concern with administrative delay in a particular proceeding or expressing concern that a particular proceeding be resolved expeditiously, will be treated as a status inquiry and therefore excluded from the definition of presentation, provided that: no view is expressed as to the merits or outcome of the proceeding should be resolved; and no specific reasons are given as to why the proceeding should be resolved expeditiously, other than the need to resolve administrative delay (emphasis in original).

This manifest violation of the Commission's ex parte rules raises serious questions as to KMTF's character qualifications. Character Qualifications, 102 F.C.C.2d 1179, 1209 (1986), on recon. 1 F.C.C. Rcd 421 (1986). The Commission has noted that willful or repeated violation of those rules is an abuse of process that "threatens the integrity of the Commission's licensing processes." 102 F.C.C.2d at 1211. Such misconduct is viewed as an indicator of whether an applicant will "in the future be likely to be forthright in its dealings with the Commission and to operate its station consistent with the requirements of the Communications Act and the Commission's Rules and policies," 102 F.C.C.2d at 1209, and the Commission has found that this type of conduct raises "concerns over the licensee's future truthfulness and reliability." 102 F.C.C.2d at 1210. See, e.g., Stearns County Broadcasting Co., Inc., 104 F.C.C.2d 688 (Rev. Bd. 1986). See also Pepper Schultz, 4 F.C.C. Rcd 6393, 6401-6403 (Rev. Bd. 1989), and cases discussed therein.

There is no question but that KMTF's ex parte violations were both willful and repeated. It solicited at least two (and likely more) letters leading to improper congressional contacts with the Commission. Moreover, these violations of the Commission's rules were directly related to its efforts to acquire facilities in Bakersfield and thus are particularly relevant to the application here. Under the Commission's character qualifications policy, these transgressions must be

considered in assessing KMTF's character qualifications. Consequently, the Commission cannot grant the application without at least holding a hearing to determine whether KMTF is fit to hold a Commission license.

## **APPENDIX B**

# Arent, Fox, Kintner, Plotkin & Kahn

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Congress of the United States  
House of Representatives  
Washington, DC 20515  
May 17, 1989

BANKING, FINANCE AND  
URBAN AFFAIRS  
COMMITTEE

SMALL BUSINESS  
COMMITTEE

VICE CHAIRMAN  
SUBCOMMITTEE ON  
ENERGY AND AGRICULTURE

TASK FORCE ON EDUCATION  
U.S.-RUSSIAN INTERPARLIAMENTARY  
CAUCUS

TASK FORCE ON POW/MIAs  
JOINT TASK FORCE ON AFGHANISTAN

Commissioner Dennis R. Patrick  
Federal Communications Commiss  
1919 M Street, N. W.  
Room 844  
Washington, D.C. 20534

Dear Dennis:

I am writing concerning the Commission's delay in the processing of the application (File No. 881012KE) filed by Community Television of Southern California ("KCET") for construction of a new commercial television station to operate on Channel 39 in Bakersfield, California.

That application proposes the first off-the-air public television service to one of the few remaining major metropolitan areas of the country without such service. KCET's application is subject to the freeze imposed by the Federal Communications Commission (FCC) to assure the availability of spectrum for high definition television.

However, I understand that KCET has requested a waiver of that freeze by demonstrating that grant of an application to operate on Channel 39 will not adversely affect the availability of spectrum for high definition television.

I have been advised that the waiver request has been pending before the FCC for six months and that until it is acted on, the Commission cannot begin the process of considering whether KCET's application for a competing application which has been filed by KNTF Channel 18, Inc. for the same channel be granted. This delay is thus denying the promptest possible institution of public television service in the Bakersfield area.

Thank you in advance for your attention to this matter.

Sincerely,

David Dreier  
Member of Congress

DD:md



**Arent, Fox, Kintner, Plotkin & Kahn**

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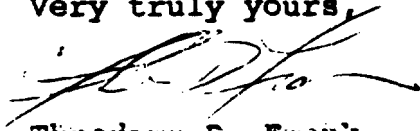
May 16, 1989

Richard Hildreth, Esquire  
Fletcher, Heald & Hildreth  
1225 Connecticut Avenue, N.W.  
Suite 400  
Washington, D.C. 20036

Dear Mr. Hildreth:

I am enclosing for your information a copy of a letter which Congressman William M. Thomas sent to the Federal Communications Commission concerning the application of Community Television of Southern California (KCET) for a new noncommercial educational station in Bakersfield, California. KCET received a copy of this letter only recently. Also enclosed is a copy of a letter I sent to the Commission with respect to Congressman Thomas' letter.

Very truly yours,

  
Theodore D. Frank  
Counsel for Community  
Television of Southern  
California

Enclosure